SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1944**

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# No. 1085

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FOREST E. LEVERS, ADMINISTRATOR, ETC.,
*Petitioner;*

*vs.*

A. V. ANDERSON, DISTRICT SUPERVISOR, ALCOHOL TAX UNIT

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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HUSTON THOMPSON,
HUGH H. OBEAR,
*Counsel for Petitioner.*

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*Respondent*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petitioner, Forest E. Levers, special administrator of the assets of a partnership formerly consisting of Forest E. Levers and Ray E. Levers, deceased, duly appointed as such by the Probate Court of Chaves County, New Mexico, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered in the above cause on the 23rd day of January, 1945.

## Opinions Below

The opinion of the Circuit Court of Appeals (R. 457) is not as yet officially reported, nor is the order of that court overruling a petition for rehearing officially reported.

They are found at pp. 457, 460 of the Record.

The orders of the District Supervisor are found at pp. 421, 424, 426 of the Record.

## Jurisdiction

The judgment of the Circuit Court of Appeals was entered on the 23rd day of January, 1945 (R. 457). The petition for a rehearing was overruled on the 23rd day of February, 1945 (R. 460).

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

## Questions Presented

1. Whether the petitioner was required as a necessary step in exhausting the administrative remedy to file a petition for reconsideration before the District Supervisor of the Alcohol Tax Unit, after decision by that official and the entering of an order by him nullifying petitioner's basic permit authorizing the purchase or resale at wholesale of distilled spirits and denying Basic Applications for Wholesaler's and Importer's permits, respectively.

2. Whether, under the facts of this case, the District Supervisor was justified in annulling petitioner's permit and in declining to grant the application for two additional permits.

## Summary Statement of Facts and the Proceedings and the Decisions Below

For approximately twenty years prior to the beginning of this proceeding Forest E. Levers and his brother Ray E. Levers, deceased, were in the business of selling and distributing distilled spirits, wine and malt beverages, covering a period before and after Prohibition, and from March 21, 1936, had a wholesaler's permit No. P-8482 under the Federal Alcohol Administration Act (Act of August 29, 1935, Ch. 814; 49 Stat. 977; 27 U. S. C. A. 201 as amended (hereinafter called the Act) and regulations thereunder until October 1, 1941, in the name of Levers Brothers.

On October 1, 1941, Ray E. Levers died and upon petitioner's petition he was appointed by order of the Probate Court of Chaves County, dated October 6, 1941 (R. 166, 167) special administrator of the estate of Ray E. Levers, deceased, insofar as the partnership assets in the firm of Levers Brothers are concerned. As said special administrator he qualified by posting surety bond in the sum of $25,000.00. He was *directed* and empowered by the Court to continue the business which had been known as Levers Brothers (R. 167). Thereafter, on October 10, 1941, upon application of the deceased's widow, Oran C. Dale, son-in-law of Ray E. Levers, was appointed co-administrator with petitioner (R. 168, 169).

The co-administrators applied for and were granted on December 26, 1941 (R. 170) a wholesaler's basic permit No. 13-P-37, which permit was subsequently annulled and the annulment of which is at issue herein.

Thereafter, Oran C. Dale, having been drafted into the United States Army, resigned as co-administrator and was discharged as such by the Probate Court (R. 179); and it became necessary for petitioner to apply for new permits.

Thereupon petitioner as co-partner and special adminis-

trator of the estate of Ray E. Levers applied on November 29, 1943, for wholesaler's basic permit to be designated as 13-P-66, and on the same date also applied for an importer's basic permit to be designated as 13-I-12. The aforesaid applications (Nos. 13-P-66 and 13-I-12) were applied for because of the retirement and discharge of said Oran C. Dale from the position of co-administrator (R. 171-177).

Permit No. 13-P-37 was annulled by the District Supervisor upon the ground that there were misrepresentations in the application made for said permit (R. 422), and the aforesaid applications for basic permits 13-P-66 and 13-I-12 were denied by the District Supervisor on the ground that applicant was not entitled to them for the reason that they "would not be maintained in conformity with the Federal laws and regulations" (R. 426). Basic permit 13-P-37 was annulled on April 5, 1944, and the two applications for permits 13-P-66 and 13-I-12 were denied on the same day (R. 421, 422, 426).

By reason of the annulment of the basic permit 13-P-37 and refusal of the applications for basic permits 13-P-66 and 13-I-12 the said business was threatened with extinction.

Despite their long continuance in the aforesaid business of selling and distributing distilled spirits, neither the petitioner nor Levers Brothers nor Ray E. Levers was ever convicted of a felony or misdemeanor under a Federal or State law, nor had a permit ever been suspended or revoked for any violation of the Federal Alcohol Administration Act or of the regulations thereunder.

The order annulling basic permit No. 13-P-37 on April 5, 1944, was a final order (R. 421, 422, 428). No petition for reconsideration was filed with the District Supervisor, as the law did not require it. Petitioner was advised by counsel and believed that such action on his part was not necessary before taking an appeal to the United States Circuit Court of Appeals, as permitted by statute, particularly

because petitioner was not seeking (1) to introduce new evidence in order to have the findings set aside, changed or modified, nor (2) because he claimed to have been misled by any change in rules, nor (3) because he claimed that he did not have a fair trial so far as being permitted to introduce evidence, nor (4) because petitioner was seeking to change any policy of the Department, and because petitioner believed that a reconsideration by the District Supervisor under the circumstances would have been an unnecessary and a vain act and would have resulted in needless delay in the prosecution of his appeal. Petitioner was also advised by his counsel that there was no case on record where a permittee was confronted with circumstances such as hereinbefore set forth. The Act, as amended, did not provide or require a petition for reconsideration be filed prior to taking an appeal, and Section 182.255 of Regulations 3, relied upon by the District Supervisor, was permissive and not mandatory.

It is, moreover, petitioner's contention that there is no case on record under the Federal Alcohol Administration Act where a permittee had his basic permit annulled, when the permittee had never been convicted of a felony or a misdemeanor either under the Federal or State law,[1] and where there had previously been no suspension of permit for violation of the said law or regulations under it; all of which facts would have been brought to the attention of the Circuit Court of Appeals had it reviewed the record in this case.

## Appeal to the Circuit Court of Appeals

On May 18, 1944 petitioner filed his appeal as provided by Section 4 (h) of the Act, said petition for appeal stating,

[1] In one case (*Malloy v. Berkshire*, 143 F. (2) 218) the Court characterizes certain of the permittees as "bootleggers", during the prohibition era. It is assumed the Court would not have used that language had not the record disclosed such permittees to have been guilty of that crime.

among other things, that "all of the points upon which petitioner relied had been presented to and urged upon the Alcohol Tax Unit" (R. 2).

The Circuit Court of Appeals declined to consider the appeal, holding in effect that the petitioner's appeal was premature because he had not filed a petition for reconsideration before the District Supervisor (R. 457).

## Statute and Regulations Involved

Applicable portions of the Federal Alcohol Administration Act and of the regulations involved in this case are set out in the appendix.

## Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In refusing to take jurisdiction of this case.

2. In holding that petitioner had not exhausted his administrative remedies.

3. In failing to hold that under the circumstances of this particular case petitioner had substantially complied with the provisions of Section 182.255 of the regulations if they required application.

4. In causing a penalty to be inflicted upon petitioner through the dismissal of his petition that was more severe than is found in any recorded cause of a similar character.

5. In dismissing the appeal.

## Reasons for Granting the Writ

a. Because the Circuit Court of Appeals failed to give proper effect to the applicable decision of this court (*Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 48), in

holding that petitioner was required to file a petition for reconsideration before the District Supervisor.

b. Because of the importance of the question involved in judicial review of administrative proceedings.

c. Because the Circuit Court of Appeals denied petitioner the right of judicial review, granted him by Federal statute, in the case of an administrative order.

d. Because the Circuit Court of Appeals denied petitioner due process of law guaranteed him by the Fifth Amendment of the Constitution of the United States.

## Conclusion

Wherefore, petitioner respectfully prays that the writ of certiorari may issue.

HUSTON THOMPSON,
HUGH H. OBEAR,
*Attorneys for Petitioner.*

Dated Washington, D. C., March 27th, 1945.

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1944**

## No. 1085

FOREST E. LEVERS, ADMINISTRATOR, ETC.,
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*vs.*

A. V. ANDERSON, DISTRICT SUPERVISOR,
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*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### POINT I

The filing of a "Petition for Recondsideration" before the same officer, board, commission, or tribunal that has finally passed upon a matter is not and should not be an indispensable step in exhausting the administrative remedy.

### POINT II

The requirements of the statute concerning judicial review were complied with.

### POINT III

The requirements of Section 182.255 of Regulations 3, if applicable to petitioner's case, are not mandatory but permissive merely.

## Point IV

Section 182.235 *as applied to the record herein* is clearly permissive.

## Point V

The facts in the instant case present a situation calling for review of the record by the Court and a correction of the action by the District Supervisor.

## Point I

**The filing of a "Petition for Reconsideration" before the same officer, Board, Commission, or tribunal that has finally passed upon a matter is not and should not be an indispensable step in exhausting the administrative remedy.**

This Court has held that application to a commission for a rehearing is not a necessary prerequisite to the bringing of suit.

In *Prendergast* v. *New York Telephone Company*, (*supra*) the District Court of the United States for the Southern District of New York granted an injunction against the enforcement of telephone rates established by the Public Service Commission of New York.

One of the defenses interposed by the Telephone Company was that the bill was prematurely filed because no petition for a rehearing had been made. This Court rejected this contention, saying:

> "Upon the making by the commission of the orders in question the proceedings had reached the judicial stage entitling the company to resort to the court for relief. Bacon v. Rutland R. Co. 232 U. S. 134, 137, 58 L. Ed. 538, 539, 34 Sup. Ct. Rep. 283, distinguishing Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 229, 53 L. Ed. 150, 160, 29 Sup. Ct. Rep. 67, in which an appeal had not been taken to the highest tribunal vested

with the final legislative authority of the state. Here the commission is vested with the final legislative authority of the state in the rate-making process; the authority exercised by the state courts upon a review by certiorari (People ex rel. Central Park, N & E River R. Co. v. Willcox, 194 N. Y. 383, 87 N. E. 517), being purely judicial and having no legislative character (Laws New York 1920, chap. 925, § 1304, 1305, pp. 437, 438).

"*It was not necessary that the company should apply to the commission for a rehearing before resorting to the court.* While, under the Public Service Commission Law, any person interested in an order of the commission has the right to apply for a rehearing, the commission is not required to grant such rehearing unless, in its judgment, sufficient reason therefor appears; the application for the rehearing does not excuse compliance with the order or its enforcement except as the commission may direct; and any change made in the original order upon the rehearing does not affect the enforcement of any right arising from the original order (§ 22). *As the law does not require an application for a rehearing to be made, and its granting is entirely within the discretion of the commission, we see no reason for requiring it to be made as a condition precedent to the bringing of a suit to enjoin the enforcement of the order.* See, by analogy, Hollis v. Kutz, 255 U. S. 452, 454, 65 L. Ed. 727, 728, 41 Sup. Ct. Rep. 371; Re Arkansas Rate Cases (C. C.) 187 Fed. 290, 306; Atlantic Coast Line R. Co. v. Interstate Commerce Commission (Com. Ct.) 194 Fed. 449, 452; Baltimore & O. R. Co. v. Railroad Commission (C. C.) 196 Fed. 690, 693, 699 and Chicago R. Co. v. Illinois Commerce Commission (D. C.) 277 Fed. 970, 974. *In Palermo Land & Water Co. v. Railroad Commission (D. C.) P. U. R. 1916E, 437, 227 Fed. 708, the statute specifically provided that no cause of action should accrue in any court out of any order of the commission unless an application for a rehearing had been made.* Here the commission did not suggest in its answer that it

perceived any ground upon which it would have granted a rehearing if an application had been made; but, on the contrary, maintained the correctness of its orders in all respects. Manifestly, under such circumstances, the injunction should not have been denied merely because application had not been made to the commission for a rehearing." (Italics ours).

That petitions for rehearing or reconsideration are *not now and should not by essential prerequisites to filing suit* is unquestionably the view of the organized bar of the United States.

In the American Bar Association's Legislative Proposal on Federal Administrative Procedure (1944) through its Special Committee on Administrative Law we find the following provisions with respect to Judicial Review:

"Section 9 (d) *Reviewable acts.*—Any rule shall be reviewable as provided in this action upon its judicial or administrative application or threatened application to any person, situation, or subject; and, whether or not declaratory or negative in form or substance, any administrative act or order directing action, assessing penalties, prohibiting conduct, affecting rights or property, or denying in whole or in part claimed rights, remedies, privileges, permissions, moneys, or benefits under the Constitution, Statutes, or other law of the land, except in matters expressly committed by law to absolute executive discretion, shall be subject to review pursuant to this section: *Provided, however*, that only final actions, rules or orders, or those for which there is no other adequate judicial remedy (including the neglect, failure, or refusal of any agency to act upon any application for a rule, order, permission, or the amendment or modification thereof, within the time prescribed by law or within a reasonable time), shall be subject to such review; any preliminary or intermediate act or order not directly reviewable shall be subject to review upon the review of final acts, rules, or orders; *and any action, rule, or order*

*shall be final for purposes of the review guaranteed by this section notwithstanding that no petition for rehearing, reconsideration, reopening or declaratory order has been presented to or ruled upon by the agency involved.*" (Italics ours.)

and in the explanatory statement (page 7) referring to Section 9 (Judicial Review) the monograph says that it

> "*restates existing rights of judicial review*, with a specification of the categories of questions so reviewable." (Italics ours.)

In the various Law Review notes and articles where the subject is most frequently treated, we find a like accord as to existing law.

In a note on "Administrative Action as a Prerequisite of Judicial Relief"—35 Columbia Law Review, 240, 241 (1935),

> "In applying the exhaustion doctrine, it is important to determine how far a litigant must proceed in invoking the administrative remedy."
>
> * * * * * * *
>
> "The next step in the administrative process after the hearing is the petition for rehearing before the same board."
>
> "It would seem proper that one who has applied for a rehearing should be required to wait until his petition has been passed upon by the board. * * *
>
> "But if no such application has been made the additional delay and the apparent futility of the rehearing have persuaded the courts, except where constrained by statute, to dispense with it."

In Note 51 Harvard Law Review, 1251, 1252, "Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of the Courts" it is said:

> "The question arises as to when the administrative remedy has been pursued far enough. * * *"

"Usually the courts do not require application to the Commission for a rehearing before suit may be maintained."

"But if the statutes *expressly* require a petition for rehearing before a cause of action arises from a commission order the courts will give full effect thereto." Citing: Palermo Land & Water Co. v. R. R. Com. 227 Fed. 708 (N. D. Calif. 1915); McArdle v. Board of Commrs., 195 Ind. 281 (1924)"

In the instant case the statute does not require a petition for a reconsideration. The Act is silent, while the Regulation under it is expressed in the permissive language of "may."

"Exhaustion of Administrative Remedies" by Rooul Berger, 48 Yale Law Journal, 981, 988:

"The question of whether an application for an administrative rehearing is a necessary element of exhaustion and whether exhaustion is required where it is anticipated that administrative action will be unfavorable have likewise given rise to uncertainty. In an early case, Vandalia Railroad Company v. Public Service Commission, 242 U. S. 255, 260 (1916) which involved an Indiana statute declaring that 'the Commission shall have authority' to grant a rehearing, the Supreme Court held a failure to apply for an administrative rehearing precluded resort to the courts. A few years later in Prendergast v. N. Y. Tel. Co., 262 U. S. 43, 48 (1923) the Supreme Court, making no mention of the Vandalia case declared that exhaustion was unnecessary where the statute did not *require* an application for re-hearing. As a result, courts have demanded an application for an administrative rehearing as a preliminary to judicial relief *only where the statute required such application.*"

In a Note in California Law Review, Vol. 29, pp. 515, 516:

"Courts are unanimous in requiring exhaustion as a general proposition, but there is much difference in

judicial opinion as to when the requirement has been satisfied and when it will be omitted. When a hearing before an administrative tribunal has been provided, a mere oral protest thereto will not satisfy the requirement and all courts require a litigant to take an administrative appeal but there is some doubt as to whether a *petition for a rehearing* before the administrative board is essential to exhaust the remedy." "Where a *statute* provides for a rehearing and is construed to be mandatory rather than permissive it is universally held that one must be applied for or the remedy has not been exhausted. On the other hand, where no *statutory* provision is made therefor, the requirement for a rehearing has been dispensed with on the ground that it would involve additional delay and would probably be futile anyway."

The cases cited in the Circuit Court of Appeals opinion were vastly different from the present case.

While *Peoria Braumeister Company* v. *Yellowley*, 7 Cir. 123 F. (2) 637, 640; and *Leebern* v. *United States*, 5th Cir. 124 F. (2) 505, 507 (both being cases under this Act) held that the petitioner, in those cases, had not exhausted his administrative remedy, both cases were on appeal *prior to the amendment* of the regulations which did away with the necessity of an appeal to the Deputy Commissioner, and the circumstances differed greatly, as will hereinafter be shown.

When this appeal was taken Section 182.257 of Regulations 3 expressly provided that "appeal to the Commissioner is not required." The *Gilchrist* case (*Gilchrist* v. *Interborough Company*, 279 U. S. 159, was simply a case of where the petitioner had filed a bill in court *before* the Commission had entered its order. It is pointed out by the court on page 206,

> "Prior to February 14, 1928, the Commission took no official action. But it appears that counsel for the Commission and the Mayor express the opinion that

> no relief should or would be granted, and perhaps used some threatening and ill-advised language. * * * At 9:20 a.m. February 14, 1928, the original bill now before us was filed. * * * Later during the same morning the Transit Commission entered an order which denied its authority to grant the new rate. * * *

And at pages 208-209 the Court said:

> "* * * the Interborough Company could not have resorted to a Federal court without first applying to the Commission as prescribed by the statute; and having made such an application, it could not defeat orderly action by alleging an *intent* to deny the relief sought." (Italics supplied.)

Clearly the *Gilchrist* case was one in which an order had not become *final* and is not in point.

The *Red River Broadcasting* case (*Red River Broadcasting Company* v. *Federal Communications Commission*; Baxter intervener), United States Court of Appeals for the District of Columbia, 98 F. (2d) 282, was one in which the Red River Broadcasting Company, which took the appeal to the Circuit Court of Appeals, never attempted to become a party to the proceedings before the Communications Commission. It sought for the *first time to enter the proceedings by the appeal*, and as Judge Miller pointed out, the Communications Act clearly indicated that interested and aggrieved persons *should first appear* before the Commission and there assert their rights. It is not in point.

No Appeal to the Deputy Commissioner Was Required

The Circuit Court of Appeals said (R. 458):

> "It is true that an appeal to the Deputy Commissioner of Internal Revenue may no longer be a condi-

tion precedent to judicial review in view of the amended regulation, Section 182-257, which in part provides:

"'Appeal to the Commissioner is not required.' * * *

"But the amended regulations do not do away with application for reconsideration, an administrative remedy not availed of by the petitioner.' * * *" (Italics supplied.)

It thus seems clear that the Circuit Court of Appeals based its opinion upon the claimed failure of petitioner to file a petition for reconsideration, and in so holding, its ruling was contrary to the applicable decision of this court in *Prendergast* v. *New York Telephone Company*, *supra*, and to the proper interpretation to be placed upon administrative procedure.

## Point II

### The requirements of the statute concerning judicial review were complied with

There was no requirement under the statute that petitioner file a petition for reconsideration before taking an appeal to the Circuit Court of Appeals.

The requirements of the statute are merely that:

"An appeal may be taken by the permittee * * * from *any order* * * * annulling a basic permit.

"No objection to the order * * * shall be considered by the Court unless such objection shall have been urged before the Administrator. * * *"

The order appealed from was precisely that sort of order. It was a final order. Every point urged upon the Appellate Court had been urged upon the Alcohol Tax Unit (R. 2). Nothing new was offered in the Circuit Court of Appeals that was not urged upon the District Supervisor.

## Point III

**The requirements of Section 182.255 of Regulation 3, if applicable to Petitioner's case, are not mandatory, but permissive merely.**

The regulation in question provides:

> "Within 2 days after an order is made by the Commissioner or district supervisor *revoking* a basic permit, the permittee *may* file an application with such Commissioner or district supervisor, for a reconsideration of such order, on one or more of the following grounds:
>
> (1) The order is contrary to law, or
>
> (2) is not supported by the evidence, or
>
> (3) Because of newly discovered evidence which the permittee, with due diligence, was unable to produce at the hearing, etc. * * *"

It is submitted that the words "*may* file" in this situation mean precisely what they say—"*may* file" and not "*must* file."

It is nothing more, in effect, than the same privilege permitted any litigant in court to file a motion for a new trial in a District Court before appealing to a Circuit Court of Appeals, or to file a petition for rehearing in a Circuit Court of Appeals before applying to this Court for a petition for certiorari.

The permissive nature of the petition for reconsideration is clearly indicated in the monograph of the Attorney General's Committee in Administration Procedure in Government Agencies (1940) "Part 5 Federal Alcohol Administration", page 28, where it is said:

> "Petitions for reconsideration, though permissible under the rules of practice (55),[2] have rarely been filed,

[2] The footnote reference (55) in the above quotation is to Regulations No. 1 (1935) art. IV, sec. 5. That regulation was in fact stronger than Sec. 182.255.

and then only in cases in which the parties have discovered new evidence on the basis of which reopening of the hearing was requested. These petitions have always been granted and have resulted in the designation of the matter for further hearing."

It is submitted that regulation 182.255 did not require petitioner to file a petition for reconsideration, for the reasons above set forth.

## Point IV

**Petitioner maintains that Section 182.255 is not indefinite if applied in the light of the Federal Alcohol Administration Act and the record herein.**

If there is an ambiguity in the interpretation of Section 182.255 it arises because of the interpretation put upon it by the District Supervisor and the refusal of the Court of Appeals to take jurisdiction because of that interpretation.

In the light of the declaration of the American Bar Association Legislative Proposal on Federal Administrative Procedure (1944), through its Special Committee on Administrative Law, *supra*, the Note on "Administrative Action as a Prerequisite of Judicial Relief" from the Columbia Law Review, *supra*; Note 51 Harvard Law Review, *supra*, the "Exhaustion of Administrative Remedies" by Raoul Berger, Yale Law Journal, *supra*, the Note in the California Law Review, *supra*, and the cases from this Court on the subject, differentiating the necessity and the non-necessity for a rehearing as a prerequisite to appeal to

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Section 5 of Regulations 4 is as follows:

"Sec. 5. *Reconsideration of orders.*—Within 10 days after service of the order of the Administrator denying a permit application or *revoking, suspending or annulling* a basic permit, or within such further time as the Administrator, in his discretion, may allow, the applicant or the respondent, as the case may be, may file a petition under oath with the Administrator for reconsideration of such order, stating therein the grounds relied upon. * * *" (Italics ours.)

the courts, it is respectfully submitted by the petitioner that the interpretation put upon the permissive language of Section 182.255 in this case was not unreasonable and should have been the basis for the acceptance of jurisdiction by the Court of Appeals. It was only when the Court of Appeals interpreted the permissive language of the Regulation as mandatory, when the statute was silent as to procedure, that a cloud of ambiguity began to be cast over Section 182.255. Apropos of the right and necessity for review from the actions and orders of administrative bodies, the remarks made by Senator Wayne L. Morse, who has just come to the United States Senate from the War Labor Board, in connection with an amendment offered by him to the proposed War Manpower Commission legislation, becomes very suggestive here. The debate on this subject is found in the current Congressional Record, No. 44, March 8, 1945, page 1950 and thereafter. Senator Morse said, in part, as follows:

> "There is growing up in this country a trend toward * * * administration of law by the executive branch of Government through administrative officers who, in my judgment, do not have their opinions and views sufficiently checked by other branches of Government. I think it is a dangerous trend.
>
> "It is proposed that the man whose regulations may be challenged by a citizen * * * shall be given the power to set up his own tribunal to judge whether or not he, in fact, has been unreasonable in the exercise of his duties under the act.
>
> "I think it is a very bad principle of government * * * to give the power to pass upon * * * regulations to a tribunal appointed by the administrator himself.
>
> "As a result of my experience with some of the appeal tribunals * * * I have no illusion with regard to them, and I should like to prevent the repetition of such a mistake in this particular bill.

"We know how they would work in practice. We know that in practice the chairman of the War Manpower Commission would, by and large, call the shots under the proposed act. * * * I believe (this) irrespective of who occupies the position. I intend no personal reference. The citizen should have protection from the arbitrary exercise of power * * *."

It is suggested that in the light of the foregoing references and statements this Court may well consider the plight of attorneys, no matter how learned, in attempting to advise with respect to the language of administrative regulations couched in permissive words.

POINT V

**The facts in the instant case present a situation calling for review of the record by the Court and a correction of the action by the District Supervisor.**

In *Pottsville Broadcasting Company* v. *Federal Communications Commission*, 98 F. (2) 288, the Company applied for a permit to construct a broadcasting station in Pottsville, Pennsylvania. Charles D. Drayton, in Washington, D. C., was the President of the Company and potentially the heaviest stockholder.

The application was denied by the Pennsylvania Securities Commission, which held that there was not a sufficient showing of financial ability in the applicant, and that Drayton, not a resident of Pottsville, was not familiar with the needs of the listening audience in that region. The Court (Groner, C. J.) sent the case back to the Commission for reconsideration and said:

"If the Commission should be of opinion, upon reconsideration, that the application ought not to be granted because a stranger to Pottsville has the controlling financial interest in the applicant corporation,

> and should announce a policy with relation to the grant of local station licenses, confining them to local people, we should not suggest the substitution of another view. But in saying this we are not unmindful of the obvious fact that such a rule might seriously hamper the development of backward and outlying areas."

In *Atlanta Beer Distributing Company, Inc.* v. *Alexander, Federal Alcohol Administrator*, 93 F. (2d) 11, petitioner applied for a permit to engage in the business of purchasing at wholesale wine and malted liquors, etc. The hearing officer recommended denial of the application. Exceptions were filed and overruled by the Administrator.

The President-Treasurer of the Corporation had a criminal record consisting of five convictions in State and Federal courts. It was on this ground that the Administrator denied the application for a permit, saying "that the corporation was not likely to maintain its operations in conformity to federal law." The majority opinion of the Court stated that:

> "No objection to the order shall be considered by the court unless it shall have been urged before the Administrator, *or there were reasonable grounds for failure so to do.*" (Italics supplied.)

In contrast to the instant case the question was (1) not the consideration of the issuance of basic permit No. 13-P-37, but the *annullment* of this permit issued approximatley three years before; (2) applicant and his associates had never been convicted of a felony or misdemeanor in a Federal or State court nor had had a suspension of a license; (3) petitioner was not asking the Court to upset the findings of fact, as in the case of *Atlanta Beer Distributing Company, Inc.*, supra.

On the other hand, the District Supervisor was acting upon a mistake of law, both arbitrarily and capriciously

to the prejudice of petitioner, since the above facts were sufficient to permit petitioner to read the rules as permissive and the case should have been returned to the Supervisor.

Judge Hutcheson in his dissenting opinion uttered words that could well be considered in the instant case, when he said (p. 13):

> "The result of the action of the Administrator, therefore, in, as appellant claims, arbitrarily refusing a permit is not to prevent applicant's entering into new business, *but it is to take from it* and destroy the established business and capital which it has already built up * * *. I think that under the facts disclosed, the Administrator could not deny the permit except upon the clearest showing that one of the statutory grounds for refusing it existed." (Italics supplied.)

In the instant case the Circuit Court of Appeals apparently made its decision solely on the technical ground that the petitioner failed to ask for a reconsideration.

In *Arrow Distilleries* v. *Alexander*, 109 F. (2) 397, the petitioner's license was suspended because (1) he had falsified certain records which were to be kept by the holders of basic permits; (2) misbranded bottles of whiskey by misdating their age; (3) sold spirits in bottles in interstate commerce for which the petitioner had received no certificate of label approval. Note that the permits were *suspended* but *not annulled*, so that the petitioner had the opportunity of rectifying any violations without having its business and assets destroyed.

In contrast, in the instant case there is no substantial testimony showing that after the granting of basic permit No. 13-P-37 to officers of a court they knowingly and intentionally violated the law or regulations. Yet the things for which they were charged during that period such as "exclusive outlet" control and "tied house", inducements

as in U. S. C. A. Section 205(a) and (b) respectively, were certainly not as offensive to the law as were those in the above case. Nevertheless, the Supervisor did not annul the permit.

In the case of the *Middlesboro Liquor and Wine Company, Inc. v. Berkshire*, 133 F. (2) 39, the facts were that a wholesaler's basic permit was issued to appellant. Four years later it was annulled, and appeal taken to the U. S. Court of Appeals for the District of Columbia. The appellant's permit was procured through fraud and concealment and misrepresentation of a material fact in that the true interest of Floyd Ball, the principal stockholder, member of its Board of Directors and Secretary-Treasurer was concealed, he being a person with a criminal record, and had not divested himself of an interest in the Company.

In arriving at its decision the Court went very thoroughly into the record.

In the opinion, Justice Miller made a distinction between annullment proceedings and those for suspension or revocation. Referring to the limitations of Section 4(i) of the Act he said:

> "However, those limitations have no relation to annullment proceedings. They are specifically confined to proceedings for suspension or revocation. This is even more clearly shown by reference to Section 4(c) in which the three distinct types of disciplinary action are enumerated and defined. An entirely different situation exists when it appears that a permit has been procured by fraud, misrepresentation or concealment than when a permit has been properly procured but has been improperly used. Proceedings to suspend or revoke are concerned with nonuser or *misuser after the granting of the permit.*" (Italics supplied.)

In contrast, in the instant case, (1) there was no criminal record to consider; (2) the application for Permit No. 13-P-

37 was made by the permittees, officers of a Court; (3) there was no substantial evidence that could be applied to these officers, not only because Mr. Ray E. Levers, against whom most of the evidence was given, was dead, but because the applicants were either new or had completely changed their position and approached the Unit as officers of the Court, ordered by a Court to carry on the business. Therefore, the District Supervisor should in no sense have considered the case as one calling for annulment but, if at all, following the distinction made by Justice Miller, one of misuser after the granting of the permit. In not considering the record the court apparently did not review the transcript, which would have illuminated all these points.

In the case of *Monarch Distributing Company* v. *Alexander, et al.*, 119 F. (2) 953, the question was the refusal to grant petitioner a basic permit. At the hearing on the application, subsequent to the date of the original petition but prior to final amendment thereof, it appeared that petitioner and certain of its successive Presidents had been convicted in the U. S. District Court of felonies and misdemeanors. The only question involved was whether these convictions, secured after the date of filing the original petition, were a bar to the issuance of the permit, in view of the fact that the statute prohibits permits only to persons convicted "within five years prior to date of application." The court held that it was immaterial when the conviction occurred so long as it was within five years.

In contrast, in the instant case (1) the basic permit had already been issued, so the value of a going busines was involved; (2) there was no question of criminal records; (3) applicants were in a totally different position from those in the above case and, if any correction of their acts was needed, it could have been easily handled under a suspension and not an annulment of a business that was within the active jurisdiction, control and supervision of a Court;

(4) that to annul the business under such circumstances would take the case completely out from under any precedent that might be set up in the *Moyarch Distributing Company case, supra.*

In the case of *Commissioner of Internal Revenue* v. *Aluminum Company*, 142 F. (2) 663, the Circuit Court of Appeals held that a Treasury Regulation which exceeds legislative intent of the Act, which it purports to interpret for administrative purposes, is of no effect.

The Federal Alcohol Administration Act provides for annulment but does not set up administrative procedure therein. The Federal Alcohol Unit, however, promulgated Section 182.255 for procedural purposes. This regulation provided for an application for reconsideration of an order to the author of the order, to wit, the District Supervisor. But the courts have, in reality, suggested in their respective opinions the conditions on which it would be unnecessary to ask for reconsideration from the same official, before a hearing in the Circuit Court of Appeals, as for example, (1) where no new evidence was offered in order to have the findings set aside, changed or modified; (2) no claim that a petitioner has been misled by change in rules; (3) nor that he did not have a fair trial so far as being permitted to introduce evidence; or (4) because petitioner was not seeking to change a policy of the department. In the instant case none of these grounds was asserted.

In order to interpret the regulation as mandatory, the burden was on the respondent to show the absence of any or all of the above conditions. In their absence respondent acted arbitrarily and capriciously.

In the case of *Peoria Braumeister Company* v. *Yellowley, supra*, the basic permit to engage in sale and distribution of intoxicating liquors was *suspended*—not annulled. The charge was falsifying records and failure to keep records at

its place of business. The case does not state in what respect petitioner falsified.

The position of the Government was that the respondent had no right to appeal to the court until it had exhausted its remedies before the Commissioner and the Department, as provided by the regulations.

Judge Minton of the 7th Circuit said that the petitioner had not exhausted its remedy until it asked for a reconsideration.

In contrast the same charge is made in the instant case as in the above case, to wit, that the petitioner falsified its records. Yet the Commissioner on such a charge did not annul but only suspended the permit and thus gave the applicant an opportunity of correcting any mistakes or wrongs and not destroying the business of the petitioner outright.

In the case of *Malloy & Company v. Berkshire et al.* (2nd Circuit) 143 F. (2) 218, the charge was that the dealer's basic permit was procured by fraud and misrepresentation and concealment of material facts that justified annulling the permit. A questionnaire required the Corporation to state the amount of capital stock, addresses of directors, officers, stockholders, etc., whether the applicant was a successor or under substantially the same control or financed by substantially the same interests; the source of funds invested, the names and addresses of persons who held or were expected to hold a substantial interest.

Four of the stockholders who were officers and directors had been engaged in bootlegging during the prohibition years. The respectable names of Thomas J. Malloy, President, and one Bomzon, were being used as a front. Neither one had ever actually put any money into the Corporation, whereas four bootleggers were the real financiers.

The Court held that the hearing officer had ample justification for holding that there were concealments and mis-

representations that were material, because the money supplied and the principals had been connected with the bootleg business and that this had not been disclosed. The Court further said that the Administrator had the right to know with whom he was dealing.

In contrast in the instant case, the Alcohol Tax Unit knew that those applying for the permit were officers of the Court. Neither they nor their predecessors had had any bootlegging record nor had been found guilty of a felony or misdemeanor either under the Federal or State laws.

In *Mallory Coal Company* v. *National Bituminous Coal Commission*, 99 F. (2) 399, Mr. Justice Miller said (p. 402):

> "Several tests have been used by the courts to determine whether particular orders (of Commissions) were reviewable under similar provisions in other statutes." (Parentheses ours.)

Summing up the tests as to whether an order is final and it is time for judicial review, the Court said:

> "If the order in the particular case is definitive rather than preliminary or procedural; if the order operates particularly upon the person seeking review, rather than upon the world generally or upon a large group of interested persons; if the order was entered in a proceeding, adversary in character, after notice given, with a hearing at which witnesses were examined and points of law argued, and in which findings of fact were made; if a petition for rehearing was filed urging, upon the Commission the objection to the order now urged for the consideration of the Court; each of these circumstances—and more particularly all of them together—may indicate that the administrative remedy has been exhausted and that it is time for judicial review. Until that time comes, the matter should remain in the control of the administrative agency."

Any one of the first three conditions laid down by the court was sufficient to make the order appealable. All

three were present in the instant case. Hence the order which the District Supervisor entered in the instant case comes within the definition laid down by Mr. Justice Miller as final and appealable.

In the case of *Straus* v. *Berkshire*, 132 F. (2d) 530, the question was whether the Deputy Commissioner of Internal Revenue had the authority *to suspend* the permit for a period of ninety days. The permittee asserted (1) that the amount of the suspension was too great for the offense, (2) that the suspension for three months amounted to a revocation of the permit.

Permittee had failed to present any basis in the record for showing that the suspension was unreasonable, arbitrary and capricious. Nevertheless, the permittee sought to have the case sent back to the administrative officer in order to introduce evidence to show that the suspension amounted to revocation.

In contrast the instant case (1) calls for complete annulment and not suspension; (2) there is no expressed desire to offer any evidence to change the record; (3) the annulment in the instant case would mean complete annihilation of the business; (4) the record in the instant case does, under the circumstances, show the order to be unreasonable, arbitrary and capricious in that the application was made by officers of the court who were under the control of that court, whose record was clear of crime or misdemeanor and whose actions, if in any way wrong, could have been corrected during a suspension period; all of which was evident from the record.

In the case of *Leebern* v. *United States, supra*, the facts were that the petitioner violated the provisions of Section 5 (b) of the Act by furnishing money to retail liquor dealers to buy licenses, endorsing and guaranteeing their notes, acquiring and holding an interest in their licenses, acquiring an interest in real and personal property owned, occupied

and used by them in the conduct of their business, furnishing money, renting and selling them equipment, fixtures, supplies, etc., all of which was done to prevent other persons from selling to these retailers. For these violations the permit was suspended for *only* sixty days. The court held that:

> "It functions as a tribunal of last resort set up in the statute itself for correction of errors of law committed and not corrected, in the course of the administrative procedure."

In contrast, let us assume in the instant case, that the transcript shows a case as strongly and frequently violative of the law as in the *Leebern* case. Nevertheless, the District Supervisor did not annul the permit but only suspended it for sixty days.

Furthermore, the strong intimation in the *Leebern* case is that the appeal was frivolous and groundless. The petitioner had admitted that the evidence showed, and the admissions of petitioner established, that he did the acts with the intent on his part to influence dealers to buy their liquors from him, to the partial or whole exclusion of liquors sold by others. Certainly no such contention can be read into the record and transcript in the instant case.

Under the *Leebern* case there would be no point in the Circuit Court of Appeals going into the record, as the petition admitted all the charges. But in contrast, in the record in the instant case there is no such admission on the part of the petitioner that under Permit No. 13-P-37 he admitted all or any of the charges upon which the findings were based.

The court said in the *Leebern* case that:

> "The vital consideration in such procedures as the one in question here, is the furnishing of a just, fair, and an adequate administrative procedure, which will preserve the rights of the permittee against arbitrary

and unlawful action with a minimum of resort to court review."

Such language is applicable to the situation in the instant case. Hence, we maintain that the court in the instant case was confronted with an entirely different situation and one in which it is respectfully suggested the record should have been considered.

## Conclusion

It is respectfully submitted, in the light of the Act, the Regulation in question, and the cases heretofore analyzed, where a final order is issued by a District Supervisor, and the petitioner is not seeking review of a basic permit to be issued, but one long since issued, that a reviewing court should consider the following factors: (1) that the applicant was well and officially known to the A. T. U.; (2) that the permittee or his associates had not been convicted of a crime either under a Federal or State law; (3) that neither he nor his associates had had a permit suspended; (4) that the permittee was not desiring to offer evidence to have the evidence changed; (5) that petitioner was not claiming that he was misled by a change in the requirement; (6) nor that he did not have a fair trial in so far as being permitted to introduce evidence was concerned; (7) nor that he was not seeking to change a policy of the department; but (8) that the rule prescribing procedure for a reconsideration in this case used the permissive word "*may*" and not the mandatory words "*shall*" or "*must.*"

Under such conditions it is respectfully submitted that permittee and counsel had the right to read the Regulation as permissive and should not have been required to apply for a rehearing before the same officer who issued the order.

It is further submitted that the Circuit Court of Appeals should have considered the record and taken the aforesaid matters into consideration and not refused to grant an

appeal, thereby utterly destroying a business that was under the control and supervision of a State Court.

Finally, it is respectfully submitted since there was no provision of the Act *requiring* the filing of a petition for reconsideration, the conclusion of the Circuit Court of Appeals that such a petition was an indispensable step in exhausting the administrative process was a grievous error and one which will tend to great confusion and injustice in judicial review of administrative orders unless corrected by this Court.

Respectfully submitted,

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# APPENDIX

## A. The Federal Alcohol Administration Act

The following provisions of the Federal Alcohol Administration Act (Act of August 29, 1935, ch. 814, 49 Stat., 977 ff; 27 U. S. C. A., 201 ff) as amended and in effect on January 1, 1941, are those having a bearing upon this petition.

Section 4 (b).

"An appeal may be taken by the permittee or applicant for a permit from any order of the Administrator denying an application for, or suspending, revoking, or annulling, a basic permit. Such appeal shall be taken by filing, in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon the Administrator, or upon any officer designated by him for that purpose, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. The finding of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to

adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings as to the facts by reason of the additional evidence so taken, and he shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Administrator shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347). The commencement of proceedings under this subsection shall, unless specifically ordered by the court to the contrary, operate as a stay of the Administrator's order.

**B. Regulations 3 of Bureau of Internal Revenue**

Sec. 182.255 Reconsideration of Order Revoking Permit—(a) *Time for filing application.*—Within 20 days after an order is made by the Commissioner or district supervisor revoking a basic permit, the permittee may file an application with such Commissioner or district supervisor, for a reconsideration of such order, on one or more of the following grounds:

(1) The order is contrary to law, or
(2) Is not supported by the evidence, or
(3) Because of newly discovered evidence which the permittee, with due diligence, was unable to produce at the hearing.

If the application is based on grounds (1) or (2), the permittee shall specify therein, by reference to the record, in what respects the order is contrary to law or is not supported by the evidence, as the case may be.

If the application is based on ground (3), the permittee shall summarize therein the newly discovered evidence and set forth why he was unable to produce such evidence prior to the closing of the record.

(b) *Time of hearing.*—The Commissioner or district supervisor, with whom such application is filed, may hear the application on a date and at a place to be fixed by him. The Commissioner or district supervisor, as the case may be, after hearing such application, may either affirm the order of revocation previously made, or may vacate and set aside such order and dismiss the proceedings or order a new hearing of the evidence before a designated hearing officer.

(c) *Permit privileges.* — During the period above provided for filing application for reconsideration, and until final order is duly made after such reconsideration, if such application is filed within the time provided therefor, the permit involved shall continue in force and effect, except as to restrictions on withdrawals or transportation as may be ordered by the Commissioner or district supervisor, as provided in section 182.245. (*; Secs. 3114, 3121 (b), 3170, I. R. C.)

Sec. 182.257 Appeal to the Commissioner.—Appeal to the Commissioner is not required. However, the Commissioner may, in his discretion, in order to insure uniformity of administrative action, entertain an appeal, after review and reconsideration as provided in section 182.255, from an order of revocation of a basic permit by a district supervisor, if filed with the Commissioner within 10 days of the date of the final order.

(a) *Petition.*—The petition for review must set forth facts tending to show action of an arbitrary nature, or of a proceeding and action contrary to law or regulations. No objection to the final order of the district supervisor will be considered by the Commissioner unless such objection was urged before the district supervisor in the permittee's application for reconsideration, or unless reasonable grounds for failure to urge such objections are set forth in the petition for review.

(b) *Permit privileges.*—If such request is filed within the required time, the permit involved shall continue in force and effect until the final order by the Commissioner, except as to such restrictions upon withdrawals or transportation as may be imposed by the district supervisor, as provided in section 182.245. (*; Sec. 3114, I. R. C.)

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